In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1440

DAVID WENGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in April 1970, after a jury trial before Judge Tyler in the United States District Court for the Southern District of New York, of having agreed to receive, and having received, a bribe as accountant and auditor for a Teamsters Union Pension Fund, in violation of 18 U.S.C. 371 and 1954. In June 1970 he was sentenced by Judge Tyler to concurrent prison terms of two years

and three months. The court of appeals affirmed. 442 F.2d 498. Meanwhile, petitioner had been found guilty, after a jury trial in the same district before Judge Pollack, of other conspiracy and bribery charges under the same statutes. In December 1970 Judge Pollack imposed concurrent prison sentences of two years for that conviction.

In January 1971 petitioner, having been denied bail pending appeal, began to serve the sentence imposed by Judge Pollack. Thereafter he filed a motion in the district court under Rule 36, Fed. R. Crim. P. to correct an alleged clerical error; he claimed that the court's records should be altered to show that his service of Judge Pollack's sentence also constituted service of Judge Tyler's sentence on the ground that, absent express indication in the sentencing judgment, Judge Pollack's sentence must be deemed to run concurrently to Judge Tyler's sentence. Judge Tyler denied the motion (Pet. App. B, 11a-12a). The court of appeals affirmed in a lengthy opinion (Pet. App. A, 1a-10a).

The opinion of the court of appeals sets forth the particular circumstances of this case which led that court not to apply the normal rule that unless otherwise stated sentences imposed for one federal conviction run concurrently with sentences decreed on another federal conviction. In urging that the petition for a writ of certiorari should be denied, we note that in light of the unusual facts of this case the issue

as presented lacks general significance, and we rely on the opinion of the court below.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1972.

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